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In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and
FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITIONERS' REPLY BRIEF

DAVID W. MCCREADIE
(Counsel of Record)
DAVID F. POPE
LAU, LANE, PIEPER, CONLEY
& MCCREADIE, P.A.
Post Office Box 838
Tampa, Florida 33601-0838
(813) 229-2121

and

CHRIST STRATAKIS
WILLIAM J. BRADY, III
POLES, TUBLIN, PATESTIDES &
STRATAKIS
46 Trinity Place
New York, New York 10006
(212) 943-0110

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONERS' REPLY BRIEF

REPLY TO MR. LATSIS' BRIEF ON THE MERITS

We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries

imposed by federal legislation. These statutes both direct and delimit our actions.

Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990).

THE VOYAGE SEAMAN TEST PROPOSED BY MR. LATSIS IS CONTRARY TO EXISTING PRECEDENT.

Since the jury in the District Court determined that Mr. Latsis was not a seaman within the meaning of the Jones Act, 46 U.S.C. § 688, Mr. Latsis has championed any theory, even inconsistent theories, that will allow Mr. Latsis to avoid the jury's decision. Predictably, in Mr. Latsis' Brief In Opposition to Chandris' Petition, Mr. Latsis boldly proclaimed that "[t]he Decision Of The [Second Circuit] Court Of Appeals Is Proper."[1] However, the first argument in Mr. Latsis' Brief on the Merits proposes a test that conflicts with the Latsis Seaman Test set forth in *Latsis v. Chandris, Inc.*, 20 F.3d 45 (2d Cir. 1994), *cert. granted*, 115 S.Ct. 354 (1994).

In abandoning the Latsis Seaman Test, Mr. Latsis argues for a seaman test that is seductive in its simplicity. Mr. Latsis' newest seaman test would require a court to find that a maritime worker is a seaman if the worker (a) is injured during a voyage, (b) is assigned to the vessel for the duration of the voyage, and (c) contributes to the vessel's mission during the voyage (the "Voyage Test").

Mr. Latsis provides no analysis regarding the legal basis for the Voyage Test nor any practical examples regarding how the test would apply to the real marine world where thousands of special purpose vessels and structures have no fixed or definite "voyages." The only "support" that Mr. Latsis provides for the Voyage Test is (a) the cases cited in footnotes 56 and 57 and in Appendix A and (b) a policy argument that the Voyage Test fulfills the goal of the Jones Act, which Mr. Latsis alleges is to protect *all* maritime workers exposed to the "special hazards" and "particular perils" characteristic of

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[1] Respondent's Brief in Opposition, page 11.

work on vessels at sea regardless of the worker's employment-related connection to a vessel in navigation.

Contrary to Mr. Latsis' position, none of the cases cited by Mr. Latsis in footnotes 56 and 57 or in Appendix A provide any support for the Voyage Test.[2] The authority cited

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[2] *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (reversible error to determine seaman solely on the basis of worker's job description); *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957) (whether vessel is connected to the shore or on a voyage when worker is injured is not controlling on issue of seaman status); *Norton v. Warner Co.*, 321 U.S. 565 (1944) (bargeman's seaman status determined on the basis of his duties aboard vessel and the permanency of his attachment to the vessel); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940) (inconsistent with Voyage Test); *Warner v. Goltra*, 293 U.S. 155 (1934) (whether the master of a vessel is a seaman within the meaning of the Jones Act); *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 87 (1992) (seaman status determined solely by examining the nature and purpose of the vessel to which the maritime worker was attached); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984) (fleet doctrine case); *Roberts v. Williams-McWilliams Co., Inc.*, 648 F.2d 255 (5th Cir. 1981) (welder's status as a seaman determined solely on the basis that he was permanently assigned to vessel); *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277 (5th Cir. 1981) (question of fact existed regarding whether welder on offshore construction job was permanently assigned to a fleet of derrick barges); *Davis v. Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977) (reversed summary judgment for defendant where there was evidence that welder was permanently assigned to a derrick barge); *Hatch v. Durocher Dock & Dredge, Inc.*, 33 F.3d 545 (6th Cir. 1994) (denied seaman status to worker who lacked an employment-related connection to a vessel in navigation); *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975) (denied seaman status to worker not more or less permanently assigned to vessel); *Harney v. William M. Moore Building Corporation*, 359 F.2d 649 (2d Cir. 1966) (denial of seaman status as a matter of law improper under Three-part or Salgado Seaman Test); *Weiss v. Central Railroad Company of New Jersey*, 235 F.2d 309 (2d Cir. 1956) (examined entire course of worker's employment in determining seaman status); *United States v. Atlantic Transport Co.*, 188 F. 42 (2d Cir. 1911), *cert. denied*, 223 U.S. 724 (1911) (whether aliens employed aboard ship are seamen for purpose of immigration act); *The J.S. Warden*, 175 F. 314 (S.D.N.Y. 1910) (bartender

by Mr. Latsis is inapposite.[3] In fact, the cases that actually analyze the relationship necessary to establish seaman status are virtually unanimous in holding that seaman status is determined by looking at the maritime worker's entire employment and not at a "snapshot" of where the worker is located or what the worker is doing at the exact point in time of the injury.[4] When not an advocate for Mr. Latsis, even

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cannot be denied seaman status solely because he did not engage in the navigation of the ship); *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247 (3d Cir. 1994) (fleet doctrine case explaining that situs of injury is nondeterminative of seaman status); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992) (pilot was not a seaman because he lacked permanent attachment to vessel); *Porche v. Gulf Mississippi Marine Corp.*, 390 F.Supp. 624 (E.D. La. 1975) (welder's seaman status determined solely on the basis of the permanency of his assignment to vessel); *Rufolo v. Midwest Marine Contractor*, 6 F.3d 448 (7th Cir. 1993) (pilot's status as a seaman was not at issue); *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707 (8th Cir. 1994) (temporary service laborer denied seaman status based on the lack of a definite and permanent vessel connection); *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567 (9th Cir. 1992) (seaman status denied solely on the basis that the vessel was not in navigation); *Ringering v. Compania Maritima De-La-Mancha*, 670 F.Supp. 301 (D. Or. 1987), *aff'd*, 848 F.2d 1243 (9th Cir. 1988) (pilot's status as a seaman determined on the basis that pilot was on board to navigate the vessel and was more or less permanently connected to vessel), and *O'Boyle v. United States*, 993 F.2d 211 (11th Cir. 1993) (inconsistent with Voyage Test).

[3] Also, Appendix A violates Rule 24.3, Supreme Court Rules.

[4] *Reeves*, 26 F.3d 1247; *Easley v. Southern Shipbuilding Corp.*, 936 F.2d 839, 843-845 (5th Cir. 1991), *vacated and remanded*, 112 S.Ct. 1463 (1992), *aff'd*, *Easley v. Southern Shipbuilding Corp.*, 965 F.2d 1, 4-5 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *New v. Associated Painting Services, Inc.*, 863 F.2d 1205, 1208 (5th Cir. 1989); *Miller v. Patton-Tuily Transp. Co., Inc.*, 851 F.2d 202, 204 (8th Cir. 1988); *Smith v. Nicklos Drilling Co.*, 841 F.2d 598, 599 (5th Cir. 1988), *cert. denied*, 488 U.S. 956 (1988); *Lormand v. Superior Oil Co.*, 845 F.2d 536, 540-541 (5th Cir. 1987); *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1027-1028 (5th Cir. 1987); *Langston v. Schlumberger Offshore Services, Inc.*, 809 F.2d 1192, 1193-1194 (5th Cir. 1987); *In re Putton-Tully Transp. Co.*, 797 F.2d

Professor David W. Robertson ("Professor Robertson") agrees that "[t]he site of the injury is not determinative; seamen hurt on platforms or even ashore are still seamen, and nonseamen hurt on vessels are still not seamen." David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex. L. Rev. 973, 997 (1977) (footnotes omitted).

Mr. Latsis' policy argument that *all* maritime workers exposed to "special hazards" at sea should receive seaman's remedies is also contrary to existing precedent. *Kollias v. D & G Marine Maintenance*, 29 F.3d 67 (2d Cir. 1994); *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38 (2d Cir. 1982). In both *Kollias* and *Cove Tankers*, the Second Circuit held that maritime workers conducting repairs during a voyage at sea are entitled to compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"). *Kollias*, 29 F.3d at 75; *Cove Tankers*, 683 F.2d at 39.

Prior to his representation of Mr. Latsis, Professor Robertson admitted the following:

> [I agree with] the overwhelming weight of authority in taking it as given that seaman status cannot be established by any worker who fails to demonstrate that a significant portion of his work was done aboard a vessel. Some workers who unmistakably confront the perils of the sea, often in extreme form, are thereby left out of the seamen's protections.

David W. Robertson, *A New Approach to Determining Seaman Status*, 64 Tex. L. Rev. 79, 93 (1985) (footnote omitted).

206, 210 (5th Cir. 1986); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (*en banc*); *Buras v. Commercial Testing & Engineering Co.*, 736 F.2d 307, 311 (5th Cir. 1984); *Bouvier v. Krenz*, 702 F.2d 89, 90 (5th Cir. 1983); *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980); *Dean v. McKie Co.*, 771 F.Supp. 466, 471 (D. Mass. 1991); *Reecer v. McKinnon Bridge Co.*, 745 F.Supp. 485, 492 (M.D. Tenn. 1990). *But see Stanfield v. Shellmaker, Inc.*, 869 F.2d 521 (9th Cir. 1989) (distinguished by *Reeves*, 26 F.3d at 1258 n.16).

Whether or not a maritime worker is exposed to "special hazards" or "particular perils" at the time of his injury is not the *sole* basis for determining whether a maritime worker is a seaman. This Court has held repeatedly that seaman status is determined by a maritime worker's employment activities and not the worker's physical location at the time of his injury. *Braen v. Pfeifer*, 361 U.S. 129, 131-133 (1959) (seaman status not determined by nature of seaman's duties at the time of the injury or situs of injury); *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 372-373 (1956) (determining maritime worker was not a seaman as a matter of law was error even though accident occurred on shore where question of fact existed regarding worker's permanent attachment to vessel); *Warren v. United States*, 340 U.S. 523, 529-530 (1951) (maritime worker injured in dance hall on shore leave entitled to seaman's remedy of maintenance and cure); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 736-737 (1943) (right to recover seaman's remedy of maintenance and cure does not depend on place where injury occurs); *O'Donnell v. Great Lakes Dredge & Co.*, 318 U.S. 36, 42-43 (1943) (seaman status depends on the nature of the service and its relationship to the operation of the vessel on navigable waters and not on the location of worker when the injury occurs). *Accord Higginbotham v. Mobil Oil Corporation*, 545 F.2d 422, 433 (5th Cir. 1977), *rev'd on other grounds*, 436 U.S. 618 (1978) (neither the situs of the employee's work nor the place of injury is determinative of seaman status). Rather, "[t]he key to seaman status is employment-related connection to a vessel in navigation." *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355 (1991).

The Voyage Test utilizes a "snapshot" or "point-of-rest" analysis to determine seaman status that is contrary to the plain meaning of *Wilander*. Under the Voyage Test, a court would focus on the putative seaman's situs or location at the exact time of his injury regardless of the length of the maritime worker's employment-related connection to a vessel in navigation. Although *Wilander* did not specifically define the employment-related connection to a vessel necessary for a

maritime worker to establish seaman status, *Wilander* contradicts Mr. Latsis' simplistic approach. 498 U.S. at 354-355.

Important statements in *Wilander* regarding the test for seaman status are as follows:

> There is no indication in the Jones Act, the LHWCA, or elsewhere, that Congress has excluded from Jones Act remedies those traditional seamen *who owe allegiance to a vessel at sea*, but who do not aid in navigation.
>
> * * *
>
> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, *solely in terms of the employee's connection to a vessel in navigation.*
>
> * * *
>
> All who work *at sea in the service of a ship* face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.
>
> * * *
>
> It is *not the employee's particular job* that is determinative, *but the employee's connection to a vessel.*
>
> * * *
>
> The key to seaman status is *employment-related connection to a vessel* in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel.
>
> * * *
>
> "There is implied a *definite and permanent connection with the vessel*, an obligation to forward her enterprise."

498 U.S. at 354-355 (emphasis added). *Wilander* does not support Mr. Latsis' argument that participating in a voyage

transforms a land-based maritime worker, who spends 90% of his time ashore, into a seaman.

The statements that appear in *Wilander* are consistent with analyzing the employment relationship between the maritime worker and a vessel and are inconsistent with the proposition that a maritime worker's seaman status is dependent on whether he is on a voyage. "[A]llegiance to a vessel at sea," "solely in terms of the employee's connection to a vessel in navigation," "at sea in the service of a ship," "not the employee's particular job . . . but the employee's connection to a vessel," "employment-related connection to a vessel" and "definite and permanent connection with the vessel" are not synonymous with the Voyage Test's "injured during a voyage" element. The *Wilander* descriptions are consistent with an analysis of the worker's employment-related connection to a vessel during the worker's entire "course of employment." Indeed, the LHWCA and the Jones Act specifically provide remedies to maritime workers injured in the "course of employment" and "course of [their] employment," respectively. 33 U.S.C. § 902(2); 46 U.S.C. § 688; *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 4-5 (1946). *See also Braen*, 361 U.S. at 131-133; *O'Donnell*, 318 U.S. at 42-43.

As the Third Circuit Court of Appeals states:

> [T]he Supreme Court held that occurrence of the injury on land was not material, rather Jones Act coverage depended only on a finding that the injured party was "an employee of the vessel, engaged in the course of his employment" at the time of the injury.
>
> * * *
>
> As the Supreme Court has recognized, stripping seaman status from such an employee, or allowing that same employee to oscillate between seaman and non-seaman status, is not only elusive, but in the face of injury would be a travesty of justice.

Reeves v. Mobile Dredging & Pumping Co., Inc., 26 F.3d 1247, 1255-1256 (3rd Cir. 1994) (citations omitted) (footnote omitted). Thus, any rule regarding seaman status that ignores

the maritime worker's activities during the "course of his employment" and focuses solely on the maritime worker's place of injury is contrary to Supreme Court precedent, the LHWCA and the Jones Act. *Reeves*, 26 F.3d at 1255-1256. *See also Braen*, 361 U.S. 129; *Senko*, 352 U.S. at 373; *Warren*, 340 U.S. at 516; *Aguilar*, 318 U.S. 724; *O'Donnell*, 318 U.S. 36.

Another flaw in the Voyage Test is exposed if the Voyage Test is applied to the facts in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991). Mr. Gizoni would arguably obtain seaman status anytime that he was sailing on a "voyage" aboard the work platforms. Conversely, assuming that Mr. Gizoni returned to shore at the end of a "voyage" to obtain supplies or perform shoreside work, Mr. Gizoni would become a longshoreman. Assuming this transition occurred numerous times each day, Mr. Gizoni would fall in and out of Jones Act coverage and in and out of LHWCA coverage countless times each day. Although this "strobe light" of Jones Act/LHWCA coverage suits Mr. Latsis' purpose in this case, the Voyage Test conflicts with the LHWCA and Supreme Court precedent and would create a legal nightmare for the employees, employers, juries and courts required to differentiate between seamen and longshoremen.[5]

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[5] Also, the Voyage Test fails maritime workers who are seaman if the "vessel" does not engage in a "voyage." A maritime worker who is assigned permanently to, or who performs a substantial part of his work aboard, a submersible drilling rig is a seaman. *See, e.g., Colomb v. Texaco, Inc.*, 736 F.2d 218, 221 (5th Cir. 1984); *Wallace v. Oceaneering International*, 727 F.2d 427 (5th Cir. 1984). However, under the Voyage Test, the drilling worker is not a seaman because there is no "voyage." Even if "voyage" is not defined as a "journey across water" and the voyage is defined as the entire time the drilling rig is stationed at sea, the worker would fail the Voyage Test because the worker would not be assigned "for the duration of the [drilling rig's] voyage."

Under the Voyage Test, even lawyers are "seamen." If an attorney with knowledge of the conditions that sometimes cause accidents aboard cruise ships is hired by a shipowner to perform a safety inspection of the owner's cruise ship, if the lawyer performs the inspection while the vessel

Although *Wilander* did not define the employment-related connection necessary for a maritime worker to qualify as a seaman in all respects, this Court's prior holdings and policy statements regarding whether Congress intended for maritime workers to walk in and out of LHWCA coverage is unequivocal. *Director, Office of Workers' Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297, 317 n.26 (1983); *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 83 n.18 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 273-276 (1977). *See also Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Garvey Grain Co. v. Director, Office of Workers' Compensation Programs*, 639 F.2d 366, 371 (7th Cir. 1980). As *Northeast* states:

> The [LHWCA] focuses primarily on occupations - longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity.
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> [T]o exclude [the maritime worker] from the [LHWCA's] coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate.
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is sailing between Nassau, Bahamas and Miami, Florida, and if the attorney is injured during that voyage, the attorney is a "seaman" under the Voyage Test. The Voyage Test bestows seaman status on the lawyer because the lawyer is injured during a voyage, is assigned to the vessel for the duration of the voyage, and contributes to the mission of the vessel, which is transporting passengers safely. The Voyage Test must be scuttled.

> [P]etitioners fail to give effect to the obvious desire to cover longshoremen whether or not their particular task at the moment of injury is clearly a "longshoring operation." The theory does not comport with the [LHWCA's] focus on occupations and its desire for uniformity. . . . "The evil of the old Act was that it bifurcated coverage for essentially the same employment. The point-of-rest approach would seem to result in the same sort of bifurcation, since the same employee engaged in an activity beyond the point of rest would cease to be covered."

432 U.S. at 273-276. "Congress was especially concerned that some workers might walk in and walk out of coverage." *Pfeiffer*, 444 U.S. at 83 n.18. "[T]he compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." *Perini*, 459 U.S. at 317 n.26. Therefore, "whether an individual is a maritime employee for purposes of LHWCA coverage is controlled by analysis of his 'basic' employment, rather than the employee's particular work at the moment of the accident." *Brockington*, 903 F.2d at 1528.

Mr. Latsis' invitation to this Court to adopt the Voyage Test is a Trojan horse. The Voyage Test has no resolving power. The only persons aboard a vessel during a voyage that are excluded from the Voyage Test are passengers and stowaways. The Voyage Test is based on the same intuitively attractive logic and policies that this Court accepted in *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926) and *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and that Congress rejected in 1926 and 1972 with the passage of, and the amendment to, the LHWCA. *See Wilander*, 498 U.S. at 347-348. Apparently encouraged by the Court's willingness in 1926 and 1946 to confer seaman status on land-based maritime workers based solely on their exposure to seamen's hazards and without any regard to the worker's lack of employment-related connection to a vessel in navigation, Mr. Latsis urges the same result in the instant case.

Congress' rebuke of *Haverty*, *Sieracki* and the policy urged by Mr. Latsis is clear. *Wilander*, 498 U.S. at 347-348. The LHWCA provides recovery for injury to a broad range of land-based maritime workers, but explicitly excludes seamen from its coverage. *Wilander*, 498 U.S. at 347; 33 U.S.C. § 902(3)(G). Thus, regardless of the similarity between the dangers faced by land-based maritime workers and seamen, the two classes of workers are mutually exclusive. *Wilander*, 498 U.S. at 347, 353; *Swanson*, 328 U.S. at 7-8. Any seaman test that confers seaman status on a maritime worker based *solely* on the argument that the putative seaman is exposed to the perils of the sea readopts the mistaken logic of *Haverty* and *Sieracki* and contravenes the express mandate of the LHWCA. *See Wilander*, 498 U.S. at 347-348, 354.

THE JURY REJECTED MR. LATSIS' ARGUMENT THAT THE CHANDRIS REQUEST FOR MEDICAL TREATMENT FORM CONTROLS THE ISSUE OF SEAMAN STATUS.

The jury considered and rejected Mr. Latsis' argument that Chandris' medical treatment form controls Mr. Latsis' work status. Certainly, Mr. Latsis would not agree that the request for medical treatment form would govern this case if the ship's physician had crossed out "crewmember" and written in "land-based worker" or "longshoreman." Any rule based on titles or labels would unfairly restrict Jones Act and LHWCA remedies in future cases. More importantly, this Court has already rejected Mr. Latsis' argument. *Gizoni*, 502 U.S. at ___, 112 S.Ct. at 494 (determining seaman status as a matter of law on the basis of job title or description is reversible error).

IN DETERMINING MR. LATSIS' SEAMAN STATUS, MR. LATSIS' WORK ACTIVITIES SUBSEQUENT TO HIS INJURY ARE IRRELEVANT.

The trial judge's instruction to the jury regarding Mr. Latsis' post-accident work aboard the drydock in Bremerhaven, Germany was proper. Mr. Latsis' post-injury work is not relevant to his status as a seaman. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190-191 (1952). In addressing the question of whether plaintiff Desper had obtained seaman status at the time of his accident, *Desper* states:

> To be sure, [Desper] was a probable navigator in the near future, but the law does not cover probable or expectant seamen but seamen in being. It is our conclusion that while engaged in such seasonal repair work Desper was not a "seaman" within the purview of the Jones Act.
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> "The fact that [Desper] had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature."

342 U.S. at 190-191. Mr. Latsis' assertion that seaman status is determined by examining the injured worker's activities subsequent to the injury is unsupportable.[6]

Alternatively, the S/S GALILEO was withdrawn from navigation as a matter of law while in the drydock in Germany. The rebuilding of the S/S GALILEO occurred between October 1989 and March 1990 at a cost of $65 million. (J.A. 91, 134-135, 200). The specifications for the rebuilding were "telephone-book-size." (J.A. 94). The "major modifications" of the S/S GALILEO involved the removal of the vessel from navigable waters followed by the removal of the ship's bottom plates, removal of the ship's propellers, adding bow

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[6] *Desper*, 342 U.S. at 190-191; *Reeves*, 26 F.2d at 1257 n.13 (3d Cir. 1994); *Smith*, 841 F.2d 599-600; *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 453 (5th Cir. 1980); *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 365-366 (5th Cir. 1982); *Ramos v. Delmar Systems, Inc.*, 596 F.Supp. 1105, 1106 (W.D. La. 1984), *aff'd*, 750 F.2d 389 (5th Cir. 1985).

thrusters to the ship, overhauling the main engines, rebuilding the boilers, adding new air conditioners and satellite communication, totally reconstructing the cabins, adding lounges and reconstructing the dining rooms. (J.A. 51-53, 91, 134, 198-200). On these undisputed facts, the S/S GALILEO was not "in navigation" while in drydock as a matter of law.[7]

THE ROBISON SEAMAN TEST PROVIDES THE BEST STARTING POINT FOR DISTINGUISHING BETWEEN LAND-BASED AND SEA-BASED MARITIME WORKERS.

The District Court's jury instruction was based on the Fifth Circuit's Robison Seaman Test. In criticizing the District Court's jury instruction and the Robison Seaman Test, Mr. Latsis complains that the instruction was impermissibly more narrow than the Second Circuit's Three-part or Salgado Seaman Test as set forth in *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975). Furthermore, Mr. Latsis and the Second Circuit assert that the District Court instruction unfairly focused the jury's inquiry on Mr. Latsis' temporal relation to the Chandris fleet and ignored the principles in *Wilander* and *Gizoni*.

The irony of Mr. Latsis' criticism of the District Court's failure to adhere to the Three-part or Salgado Seaman Test is that neither the Voyage Test nor the Latsis Seaman Test adopt or incorporate any portion of the Three-part or Salgado Seaman Test.

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[7] *West v. United States*, 361 U.S. 118 (1959); *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 570-571 (9th Cir. 1992); *Boyd v. Ford Motor Co.*, 948 F.2d 283 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1481 (1992); *Wixom v. Boland Marine & Mfg. Co., Inc.*, 614 F.2d 956 (5th Cir. 1980); *Hodges v. S.S. Tillie Lykes*, 512 F.2d 1279 (5th Cir. 1975); *McClendon v. OMI Offshore Marine Service*, 807 F.Supp. 1266 (E.D. Tex. 1992); *Warwick v. Huthnance Div., Grace Offshore Co.*, 760 F.Supp. 571 (W.D. La. 1991).

Likewise, Mr. Latsis and the Second Circuit's criticism of the temporal aspect of the Robison Seaman Test is misplaced. Neither Mr. Latsis nor the Second Circuit address the fundamental flaw inherent in their position. Specifically, the final element of the conjunctive Latsis Seaman Test requires that the "course of the plaintiff's employment *regularly expose[]* the plaintiff to the hazards of the sea." *Latsis*, 20 F.3d at 57 (emphasis added). "Regularly" is defined as "at fixed and certain intervals, regular in point of time. In accordance with some consistent or periodical rule or practice." Black's Law Dictionary 1286 (6th ed. 1990). "Regularly" is undoubtedly a "temporal" word. Notwithstanding Mr. Latsis and the Second Circuit's criticism of the temporal aspect of the Robison Seaman Test, the Second Circuit discarded the permanent or substantial vessel-related connection requirement of the Robison Seaman Test and substituted the requirement that the putative seaman's employment "regularly expose[]" the maritime worker to the hazards of the sea. *Latsis*, 20 F.3d at 57. The Second Circuit substituted one temporal element for another time requirement.

Unfortunately, in order to obtain the result desired by Mr. Latsis and the Second Circuit, the "regularly exposed" language in the Latsis Seaman Test was ignored. No rational explanation exists regarding how a maritime worker who spends 90% percent of his time ashore is "*regularly exposed* . . . to the hazards of the sea."

THE ROBISON SEAMAN TEST IS THE SEMINAL STATUS TEST IN THE UNITED STATES.

Because of the enormous volume of seaman cases confronting the Fifth Circuit, that court has necessarily taken the lead in formulating rules and policy regarding seaman status. Before Professor Robertson became an advocate for Mr. Latsis, Professor Robertson described the Robison Seaman Test as a "synthesi[s] [of] the Supreme Court[] and [the Fifth Circuit's] seaman status jurisprudence into an approach that 'has stood the test of . . . time.' " David W. Robertson, *The Law of Seaman Status Clarified*, 23 J. Mar. L. & Com. 1, 2

(1992). Although Professor Robertson now criticizes the Robison Seaman Test as conflicting with *Wilander's* "vessel connection" mandate, too restrictive, and disfavored, Professor Robertson and other commentators state an opposite opinion when providing an unbiased analysis. Professor Robertson and other commentators state as follows:

> [The Robison Seaman Test] is a vessel-connection test. Robertson, 64 Tex. L. Rev. at 96.
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> *Wilander* affirms that the "master or member of a crew of any vessel" language must be dealt with in *Robison* terms . . . Robertson, 23 J. Mar. L. & Com. at 23 (footnote omitted).
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> [The Robison Seaman Test] is a *liberal* test . . . Robertson, 23 J. Mar. L. & Com. at 3 (emphasis added) (footnote omitted).
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> The *Robison* formulation quickly became the authoritative statement of the criteria for seaman status in the Fifth Circuit, and has been highly influential in most of the other circuits. Because the overwhelming majority of the seaman status cases have arisen in the courts of the Fifth Circuit, courts in other circuits have generally relied on Fifth Circuit decisions. Robertson, 64 Tex. L. Rev. at 95 (footnotes omitted).
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> *Robison* has been referred to as the "grandfather of Jones Act cases" and was heavily relied on in *Wilander* . . . James A. George, *Wilander-Light at the End of the Labyrinth*, 16 Tul. Mar. L. J. 131, 146 (1991) (footnote omitted).
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> The *Robison* test for seaman status, as modified in *Barrett v. Chevron U.S.A., Inc.*, described below,

> has been the accepted standard in the Fifth Circuit for thirty years. *Barrett* has been generally followed in most other circuits. . . . In fact, *Robison* has been followed in legions of cases in the First, Second, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits. . . . [T]he *Robison* formula has withstood the test of time. It has also withstood serious attacks on its foundations in several intervening cases, all as witnessed by "its long line of descendants." George, 16 Tul. Mar. L. J. at 149 (footnotes omitted).
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> In its essentials the *Robison* [Seaman] [T]est was approved by the Supreme Court. This is readily seen when the two tests are set out side by side; . . . Thus the *Robison* first "prong," the "permanent assignment"/"substantial part of his work" requirement, is a legitimate way of determining "employment-related connection to a vessel." Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 6-9 at 262 (2d ed. 1994) (footnote omitted).
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> * * *
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> The Supreme Court opinion in *Wilander* mandates a Jones Act seaman status formulation consistent in both analysis and result with the existing Fifth Circuit test which denies seaman status to land-based workers who have no permanent assignment to a vessel or identifiable fleet of vessels. Eileen R. Madrid, *Seaman Status: The Supreme Court Recharts Its Course: Wilander and Gizoni*, 51 La. L. Rev. 1149, 1166 (1991).

ANY JURY REQUIRED TO DETERMINE THE STATUS OF A MARITIME WORKER IN FUTURE CASES SHOULD RECEIVE AN INSTRUCTION THAT THE LHWCA AND THE JONES ACT ARE MUTUALLY EXCLUSIVE.

In *Wilander*, this Court stated clearly that the LHWCA and the Jones Act are mutually exclusive. *Wilander*, 498 U.S. at 353. Moreover, *Wilander* reaffirms that seaman status is ordinarily a question of fact. *Wilander*, 498 U.S. at 355-356. As amicus curiae TECO Transport and Trade Corporation, et al. asserts, if juries are expected to fulfill the significant responsibility of determining seaman status, it is anomalous to fail to fully apprise the jury of the legal ramifications of its decision. Chandris agrees. The jury should receive an instruction that a maritime worker claiming seaman status is either a seaman under the Jones Act or a longshoreman under the LHWCA.

If a putative seaman elects to try his case before an admiralty court or before a judge in a civil court, the judge sits as the finder of fact. Undoubtedly, the judge is aware that his choice is not between finding that (a) the maritime worker is a Jones Act seaman who is entitled to a remedy or (b) the maritime worker is not a seaman and without a remedy. The judge knows that the Jones Act and the LHWCA are mutually exclusive and that the maritime worker will either receive seaman's remedies or compensation benefits at a level determined by Congress.[8] If a jury is responsible for making a reasoned decision based on the law, no policy reason militates in favor of shielding the jury from the truth. The jury should know that its choice is between two alternative statutory schemes.

In an effort to perpetuate the extreme prejudice to shipowners that is created when juries who are determining seaman status are "kept in the dark" regarding the maritime

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[8] Also, the maritime worker may have a claim under Section 905(b) of the LHWCA.

worker's alternative remedies, Mr. Latsis criticizes the suggestion made by TECO Transport and cites *Gizoni*, 502 U.S. 81, and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963), in support of his position. Mr. Latsis argues that *Gizoni* and *Socony* create a judicial bar preventing juries from knowing the import of their decision when determining seaman status. The holding in *Gizoni* and *Socony* is not so broad.

Gizoni and *Socony* hold that the court should not allow the jury to know that the maritime worker seeking seaman status has (a) *requested* or (b) *received* LHWCA benefits. If the jury knows that the maritime worker requested or received LHWCA benefits, the maritime worker might be prejudiced. The jury might assume that, if the maritime worker requested longshore benefits, the worker himself believes that he is a longshoreman and not a seaman. Likewise, if the jury knows that the maritime worker has already received longshore benefits, the jury might conclude that the maritime worker who is also seeking seaman's remedies at trial is attempting to "have his cake and eat it too." *Gizoni* and *Socony* hold that the potential prejudice arising from these two scenarios outweighs the shipowner's right to present the actual facts and law to the jury.

Conversely, the instruction urged by TECO Transport in future cases would not mention whether the maritime worker requested or received LHWCA benefits. The instruction urged by TECO Transport would merely allow the court to inform the jury that the maritime worker seeking seaman status is either a seaman under the Jones Act or a longshoreman/harborworker under the LHWCA. This instruction avoids the concerns articulated in *Gizoni* and *Socony* and avoids the extreme prejudice to shipowners that results when, by the court's silence, the jury is misled into believing that its determination that a maritime worker is not a seaman precludes the worker from receiving any remedy.

CONCLUSION

The judgment of the Second Circuit should be reversed and the District Court jury verdict and judgment should be reinstated.

Respectfully submitted,

David W. McCreadie
(Counsel of Record)
David F. Pope
Lau, Lane, Pieper, Conley
& McCreadie, P.A.
Post Office Box 838
Tampa, Florida 33601-0838
(813) 229-2121

and

Christ Stratakis
William J. Brady, III
Poles, Tublin, Patestides &
Stratakis
46 Trinity Place
New York, New York 10006
(212) 943-0110

Attorneys for Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd., Petitioners